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ABSTRACT

This paper is a legal analysis of the constitutionality of the Office of Education criteria for defining a self-supporting student. The criteria suggest a student cannot have been claimed as an income tax dependent, nor received more than $600, nor have lived at his parents home more than 14 consecutive days in the year for which aid is received or the year prior to that in which aid is received. The "self-supporting" definition is measured against two constitutional requirements. Equal protection is the first. It is concluded that the rules impair no fundamental rights nor contain any suspect criteria. In addition, flaws incidental to the operation of the statute do not seem severe enough to overcome the presumption of constitutionality. The criteria seem to be a reasonable exercise of legislative authority. Second, the statute is analyzed to find whether due process of law is denied because an "irrebuttable presumption contrary to facts" is created. Despite the findings by the Supreme Court that a Food Stamp Act using a definition similar to one of the elements in the Office of Education rules was unconstitutional, it seems that the Office of Education criteria would pass judicial scrutiny. The paper concludes that if the system of allocating financial aid is to be reformed it must be done via the legislative process. One possible reform is an appeals board to provide funds for students who fall just outside the self-support criteria. (Author/MJM)

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LEGAL IMPLICATIONS OF THE OFFICE OF EDUCATION CRITERIA FOR THE SELF-SUPPORTING STUDENT

Thomas G. Barkin

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Thomas G. Barkin

September 1974

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ABSTRACT

This paper examines the definition used by the Office of Education to define the "self-supporting" student. This definition is important because the need analysis for granting financial aid to students pursuing higher education is based, in great part, on the contribution a student's family can make to defray educational costs. A "self-supporting" student without such a contribution is eligible for greater governmental and institutional financial aid. Given a budget constraint more aid for a "self-supporting" student means less aid for students defined as needy on the basis of their parents' income. This paper is a legal analysis of the constitutionality of the Office of Education criteria for defining a self-supporting student. It concludes that they can meet judicial tests and any reform must come from the legislature and not the courts.

The definition is a strict one. A student cannot have been (1) claimed as an income tax dependent, nor (2) received more than $600, nor (3) lived at his parents home more than 14 consecutive days in the year for which aid is received or the year prior to year in which aid is received. Many students receiving little or no parental support are denied self-support status.

The "self-support" definition is measured against two constitutional requirements. Equal protection is the first. It is concluded that the rules impair no fundamental rights nor contain any suspect criteria. In addition, flaws incidental to the operation of the statute do not seem severe enough to overcome the presumption of constitutionality. The criteria seem to be a reasonable exercize of legislative authority. Second, the statute is analyzed to find whether due process of law is denied

because an "irrebuttable presumption contrary to fact" is created. Despite the finding by the Supreme Court that a Food Stamp Act using a definition similar to one of the elements in the Office of Education rules was unconstitutional, it seems that the Office of Education criteria would pass judicial scrutiny.

The paper concludes that if the system of allocating financial aid is to be reformed, it must be done via the legislative process. One possible reform is an appeals board to provide funds for students who fall just outside of the self-support criteria.

LEGAL IMPLICATIONS OF THE OFFICE OF EDUCATION CRITERIA FOR THE SELF-SUPPORTING STUDENT

Recent months have seen a flurry of doubts and legal questions over the status of independent student regulations for financial aid purposes.[1] These questions are being raised by financial aid officers, legislators and policymakers who are faced by ever-increasing demands from students for independent or self-support status. This paper addresses itself to the legal questions raised over whether a child who has passed his eighteenth birthday must be required to rely upon his parents for aid to go to an institution of higher education.

Section I of this paper outlines the structure of the financial aid "need" analysis. It also describes some of the factors which have contributed to the present confusion. Section II presents and analyzes the Office of Education regulations upon which "need" analysis for federal subsidies is based. Legal issues raised by the regulations are discussed in the third portion of the paper. Section IV is the conclusion and a recommendation.

NONLEGAL CONSIDERATIONS

To understand the legal issues raised by the self-support guidelines, it is necessary to understand the process the student must go through to apply for financial aid. In addition, the economic and social context in which the issue arises must be identified before elaborating on the implications of the legal debate.

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Income Maximization

When a student seeking financial aid presents himself at a university student financial assistance office, he is confronted with a stack of forms. The first decision the student must make in filling out the forms is whether he should seek to be classified as a self-supporting student or as a dependent of his parent. Crucial to this determination is the valuation of likely benefits to accrue from being categorized as self-supporting or dependent. The student is usually aware that his award will be based on his "need" relative to other students. "Need" is measured as the cost of education less the total dollars available from the student's resources and those of his parents for the college education.[2]

With this in mind the student knows he will be better off (i.e., receive a higher aid award) the more "needy" he is. The most obvious route to "needy" status is to claim that the parent's potential contribution is not available and that the sole basis for need should be his own resources. To do this, the student claims he is self-supporting. By this step, he has diminished the amount of available resources and put a heavier burden on the institution.

Social-Psychological Factors

Beyond this income maximization rationale are other, perhaps more significant social and psychological factors which encourage the student to seek self-support status. In greater and greater numbers, individuals between 18-21 years of age have been demanding (and getting) the rights of

adults. Most prominent of these rights is the right to vote conferred on all those 18 years old and older by the 26th Amendment.[3] The reasons for these dramatic changes are many and the impact on financial aids is becoming increasingly apparent.[4]

Persons over 18 no longer wish to be tied to their parents. Students are arguing that they no longer should be denied financial aid because their parents are wealthy. They see themselves as emotionally, intellectually, and morally independent and chafe at the suggestion that economic independence is any less real. The recent conflicts over the financial aid regulations center directly on this tension between how the student perceives himself and how the rules require the institution to perceive him.[5]

This perception problem is exacerbated by semantic confusion. Terms such as "independent, self-sufficent, and emancipated," are tossed about interchangeably and distort the debate. The concept of independence is a very complex and misunderstood one. As has been pointed out, it does not lend itself to a simple one line definition, but is rather a matrix of concepts depending on the type of independence considered (i.e., financial, emotional, social etc.) and the locus of that independence (i.e., individual, family, university, peers, etc.)[6] The type of independence considered for financial aid by the Office of Education regulations is limited to economic independence. The locus of that independence is the student himself. Hence, use of the term "self-supporting" best describes the issue and puts the subject in clearer focus. We are not asking whether 18-year-olds are independent, but rather, whether the present regulations accurately reflect the economic status of the self-supporting student.

Future Trends

Before moving on to a discussion of those regulations and the law, it may prove fruitful to look toward the implications of the present trends in the self-support picture.

First, there has been a marked increase in the number of students who are applying for and attaining self-support status.[7,8] If this trend continues increasing strain on institutional resources can be expected as fewer parents support their children's college educations.

Second, increasing independence by those whose parents have heretofore been contributing to the education means fewer dollars for those who are needy regardless of dependency status. When parents' income is disregarded the student from the wealthy suburb may have as few available resources as the ghetto student. Unless potential income is included (i.e., income which may be derived through future gifts and inheritances),[9] the suburban student is often eligible for as much financial aid as the ghetto student. The financial aid structure was not intended to be used in this manner. Designed to help the needy student through school it is now being used to provide a further subsidy to the middle-class student.[10]

If these trends continue, preserving the present Office of Education criteria for defining the self-supporting student may do more harm than good. Growing numbers of demonstrably self-supporting students, resulting in decreased resources available for the truly needy, could well subvert

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the intended purposes of financial aid legislation. The current unrest over the viability of the OE criteria offers an excellent opportunity for making substantial changes in the financial aid structure.

OFFICE OF EDUCATION CRITERIA

The Office of Education guidelines for defining the "Self-supporting or Independent Student" have changed often, but not significantly since their first appearance in 1967. They define a "Self-supporting or Independent Student" as a student who:

> (1) Has not and will not be claimed as an exemption for Federal income tax purposes by any person except his or her spouse for the calendar year(s) in which aid is received and the calendar year prior to the academic year for which aid is requested.
>
> (2) Has not received and will not receive financial assistance of more than $600 from his or her parent(s) in the calendar year(s) in which aid is received and the calendar year for which aid is requested, and
>
> (3) Has not lived or will not live for more than 2 consecutive weeks in the home of a parent during the calendar year prior to the academic year for which aid is requested.[11]

The first condition of the definition is the cornerstone for defining the self-supporting student. It has three major strong points which argue for its usefulness. It is, above all, certain. There are no subjective

judgments or computations which must be done to find if the particular family falls within its purview. If the child is claimed as a dependent for the prior year or will be for the present year, he is automatically ineligible for self-support. Secondly, it is easily enforced. The institution can require that parents include a copy of their federal tax return for the prior year as a condition for granting self-support status. If the parent has claimed the child as a dependent, the fact can be ascertained immediately.[12] Thirdly, the tax exemption taken for the child is prima facie evidence that the student is receiving at least half his support from the person claiming the exemption.[13]

It may well be argued that the tax criteria is so valuable that without it, the guidelines are unenforceable. The primary drawback of the tax test, however, is that it is over-inclusive. That is, by extending back beyond the year in which aid is given, the standard may be asking for information irrelevant for the period in which aid is needed.

The second condition limits the parental contribution to $600 in the year prior to and the year in which aid is given. The contribution considers both cash and in-kind payments and is, therefore, quite severe. The condition is included in order to limit the number of students seeking self-support status who are not claimed as tax dependents, but are still receiving parental contributions. Since in-kind contributions are included, insurance premiums, car payments, or any total outlay in one year by the parent exceeding $600 will taint the student's independent status. The major failing of this definition is its seeming unenforceability. Without

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careful scrutiny of both the parent's and student's financial records for two years, the institution is without means for verifying the student's sworn statement that he has not received the $600 contribution.

Sharing the same unenforceability weakness is the third condition: the student may not live at his parent's home for more than two consecutive weeks without being considered dependent for purposes of financial aid. Just why this condition was included is unclear. To enforce it the university must 1) rely on the student's honesty, or 2) maintain constant surveillance over the parent's home. Since neither of these enforcement mechanisms is wholly reliable or even realistic, the third condition is the least practical of the rules.

The second and third criteria do play a role in the statutory scheme despite their weaknesses. They place an absolute limit on the amount of support a student can receive from his parents and at the same time retain self-supporting status. This is extremely important since the tax criterion can be easily subverted by advance planning. A parent could make a simple calculation, decide he is better off not claiming the child as a dependent, and shift the burden of supporting his child's education from himself to the state. For example, assume only the tax criterion exists and a parent in the 25 percent tax bracket is deciding whether to take his college age son as a dependent or not. He calculates that the $750 deduction will provide $187.50 in tax savings at the 25 percent rate. He finds he must spend approximately $1,500 to send the son to school. Subtracting the tax saving from the cost of education, the parent calculates it will cost approximately $1,300 if he takes the tax deduction and pays for his son's school.

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The father then calculates the costs he must incur if he does not take a deduction and the son claims self-support status. The parent loses the $187.50 in tax savings, but gains many hundreds of dollars in financial aid the child will receive because of heightened need. In addition, the parent can make financial contributions to bring up his son's standard of living and still be money ahead.

The second and third criteria make this sort of abuse more difficult. Limiting the child's stay at home to two weeks and the gross contribution to $600, the Office of Education imposes behavioral constraints on the family which are far less easily manipulated than the tax form. Although the statutory framework can still be avoided by fraud or manipulation, the task is more formidable. The additional requirements necessary to prove self-support require a change in residence and a real ceiling on the standard of living the child can maintain. The non-tax related criteria close a loophole which, if left open, could easily damage the entire financial aid statutory scheme.

As is clear from the above discussion, each of the Office of Education rules embodies faults and strengths. The vital question for which this paper seeks an answer is whether the faults are severe enough to fall before constitutional scrutiny. Section III of this paper presents the legal issues on which the controversy turns and concludes that the proposed rules are probably constitutionally supportable in spite of their faults.

LEGAL ISSUES

At the outset of this analysis, it is necessary to clear away some of the misconceptions surrounding the independent student criteria. Parents

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of the 18-year-old student are concerned that the state requires them to contribute to their adult child's college education. Alternatively, the student will ask whether he is required to accept the financial assistance of his parents even though he is at least 18 years old and considers himself independent.

The most common misconception in dealing with these issues is that the 18-year-old age of majority is a relevant factor in the Office of Education calculus. The definitional clauses do not refer to majority or any majority-related criteria. In fact, majority is irrelevant for the self-supporting calculation. For example, a 16-year-old who has broken all financial ties with his parents and falls within the Office of Education rules is eligible for financial aid as an independent student. Majority, then, while often linked to independence is not taken into consideration for determining self-support.

A more complex misconception arises when parents inquire whether they are required to support their children through college. This problem is answerable on two levels. First, a parent does not have a responsibility to send the child to college. Second, it is only where the parent and child wish the child to go to college and the parent is, in some degree, supporting that child, that the state requires parental contribution.

Concerning the parent's responsibility to support a student through college, the New York Court of Appeals decision, Roe v. Doe,[14] held unequivocably that a parent bears no such responsibility. In that case, the parent became disenchanted with this daughter's living habits and ordered her to either move back to the dormitory or return home. The

daughter instead, filed suit to require the father to support her in whatever living style she chose while she was still a minor. The court held that "the father in return for maintenance and support may establish and impose reasonable regulations for his child."[15] We may assume that if a parent decides college is unnecessary or wasteful it is within his perogative to refuse to pay for the college education. The Roe Court as well as the Office of Education conceive of a college education as just one of any number of goods or services a parent may wish to buy for his dependent. There is no requirement that the parent contribute.

Any contribution a parent feels compelled to make is a function of his own desire that the child get an education as quickly as possible. The state merely has decided to limit its contributions to those students whose parents cannot afford the college cost and those who meet a rigorous self-support test.

The next section of this paper deals with the legal questions concerning the method of allocation of those resources. Those questions are: 1) whether there is a right to financial aid, and 2) whether the self-support criteria are constitutionally defensible.

Equal Protection

Whenever Congress makes a law which provides different treatment for similarly situated groups, the analysis most often applied to test for constitutionality is that derived from the Equal Protection Clause of the 14th Amendment.[16] The analysis is "two-tiered." The statute is first

examined to determine whether any suspect criteria, such as race, are used as a basis for discrimination, or whether any fundamental rights, such as the right to vote, are limited or denied. If either condition is present, the Court puts the burden on the state to show that it had a "compelling state interest" in creating the classifications. If these elements are not present, the burden is on the attacker of the statute to show that the legislature had "no rational basis" for distinguishing between the classes. If the Court can find a rational basis, the statute is considered to provide Equal Protection of the laws.[17]

The compelling state interest test

The strict judicial scrutiny approach requires that the legislative classifications be examined to find whether they are based on suspect criteria or impose on a constitutionally protected right. If either is present the Court will apply "strict scrutiny" to find if there is a "compelling state interest" for the statute. If such an interest is lacking, the classification is declared unconstitutional.[18] Commentators have observed that few, if any, classifications which involve suspect criteria or infringe on constitutionally protected rights survive strict scrutiny.[19] Because the test is so powerful, the Supreme Court is very careful when it confers "suspect criteria" status or "fundamental right" status. The most recent controversy over a "fundamental right" concerned an issue directly relevant to the problem at hand -- education.

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The Office of Education's self-support criteria may be interpreted as a denial of access to education to students who are unable or unwilling to accept financial assistance from their parents, and are unable to show they are self-supporting.

The constitutional question is whether education is a fundamental right. If so strict judicial scrutiny of the financial aid guidelines is required. A recent U.S. Supreme Court decision, San Antonio School District v. Rodriguez,[20] has held quite plainly that education is not such a basic or fundamental right. Emphasizing that "social importance is not the critical determinant for subjecting state legislation to strict scrutiny,"[21] the Court held, "(e)ducation, of course, is not among the rights afforded explicit protection under our Federal Constitution."[22]

Even if the Court had found a fundamental interest in Rodriguez, it would be highly unlikely that this interest would be extended to a college education. Rodriguez questioned whether public schools could be financed by a property tax which allocated revenues based on the wealth of the community in which the school was situated. The post-secondary education affected by the Office of Education's proposed rules does not have the stature or social necessity of primary or secondary schooling.

The OE rules are distinguishable from Rodiguez because access to education was not actually denied in that case. Rather, it was access to an equal education.[23] In this case, it is possible that a student will be denied access entirely if he is unable to get money from his parents and unable to show himself to be self-supporting. The response of the Court could take many forms. First, it is likely the Court will point out the

relative importance of college and high school, with high school having greater priority. Second, the student can show self-support if he stays out of school for one year. Third, a student whose parent's income is so great that financial aid is precluded has a higher likelihood of finding a good paying job while waiting out his one-year enforced hiatus. Faced with these or similar arguments, it is unlikely the distinction posed between Rodriquez and the OE criteria would be accorded much weight.

It may be possible to argue that the fundamental right of a family to establish its own system for organizing responsibilities and benefits among its members is impaired. The family has consistently been held in high esteem by the Court. In Meyer v. Nebraska,[24] the Court upheld the right of a family to provide for the study of the German language in a private school. Pierce v. Soc. of Sisters[25] established that States could not force families to send their children to public schools. These cases stand for the proposition that the family is the locus of authority and control over the education of its members.

If such authority is absolute, the family should not be required to finance a child's college education nor should a child be required to emancipate himself from his family. In Yoder v. Wisconsin,[26] the Supreme Court held that a family could assert its religious preferences at the expense of state compulsory education laws. Although many have felt Yoder is peculiar to the Amish appellants,[27] it does stand for a strong Court aversion to state intrusion in family affairs.

Meyer, Pierce, and Yoder, however, do not represent the same issues as are involved in the OE guidelines. Each case deals with children below

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college age -- grade school rather than college -- and compulsory education. Perhaps more significantly, none of the cases gave the parents and child reasonable alternatives to the operation of the statute.

Another distinguishing factor is that the infringement on the family by the OE rules is merely monetary. Although Harper v. Virginia Board of Elections,[28] stands for the principle that even minimal economic burdens cannot impose on fundamental rights, the instant case can be distinguished. Harper involved a Virginia poll tax of $1.50. The Court held that this small amount was an unconstitutional infringement on the franchise. The franchise is a clear and precise "right". In contrast, family autonomy is vague and amorphous. To protect the family in every conceivable instance where its interests could be asserted would strangle the operation of laws. Consequently, the family right would most probably be upheld only where the state intrusion violates firmly established beliefs rooted in a long standing tradition[29] or other important fundamental rights. Additional expenditure for a college education does not hold such a status.

The third OE criterion raises two fundamental constitutional issues -- the right to travel and the right of association. This criterion allows an independent student "to live in his parent's home for no more than two consecutive weeks."[30] The constitutional issue of right to travel is raised when a rule penalizes or discourages migration. (Shapiro v. Thompson,[31] Memorial Hospital v. Maricopa Co.[32]). A student may be deterred from taking up residence in a new city because he feels a family visit limited to two weeks would not justify expensive travel. Similarly, he is penalized by the rule because he must incur additional expense, choose from a more limited

number of schools or spend less time with his family in order to maintain "independence." The right to travel, however, is infringed upon only when the penalty imposed on the individual for traveling is very substantial. Thus, penalties such as denial of the right to vote, Dunn v. Blumstein[33] or welfare eligibility, Shapiro, are considered limitations on the right to travel.

The infringements imposed by the OE rules do not meet this standard. Attendance at publicly financed institutions of higher education was expressly distinguished from Shapiro in Starns v. Malkerson.[34] Intrusions into family relations, as demonstrated above, must be of a more substantial nature. A limited choice of colleges hardly compares with voting or welfare. In addition, moving to a new city for a college education fails to meet the constitutional definition of "travel." Shapiro requires the intent to "migrate, resettle, find a new job and start a new life" rather than mere movement.[35]

The right of association, found in the First and 14th Amendment, is probably equally inappropriate when applied here. This freedom protects the individual's perogative to choose his own associates. Arguably, the third OE criteria discourages the student from living with his family. If the Court finds this limitation intrudes upon protected freedoms it could strike down this section of the statute.

A right to live with whomever one chooses, however, has not been readily embraced in recent cases. In U.S.D.A. v. Moreno, [36] only one member of the Court felt a statute which denied food stamps to households which contained one or more unrelated persons infringed upon the

right of association. This paltry support was in spite of legislative history which indicated the statute was motivated by a desire to remove "hippies" from the food stamp program. Even this defense of the right to associate disappeared in Belle Terre v. Boraas.[37] Mr. Justice Douglas held that a zoning ordinance limiting occupancy to no more then two unrelated persons per residence did not infringe on rights of association. It appears that a vast majority of the Justices feel the right of association goes no further than protecting the right to entertain whomever one chooses. The right of individuals to live together has been left notably unprotected.[38]

The other route for requiring a strict scrutiny is identifying "suspect criteria" upon which the classification is founded. Either age or wealth may be raised as unconstitutional criteria upon which the benefits are allocated. The Court, however, has yet to accord age the suspect criteria classification. In Rodriguez, the wealth classification was limited to those classes which "shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit."[39] As pointed out above, this is not the case with the "self-support" criteria. It is unlikely, therefore, that a suspect criteria argument would be sustained.

Rational basis test

Even though strict judicial scrutiny seems unavailable for a constitutional challenge, the rules may still be questioned with the rational basis test.

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The rational basis test asks whether there was a reasonable relationship between the statute and some legitimate legislative purpose. In the area of economic and welfare legislation this meant that as long as the legislature had a reason for its action the statute was constitutional.[40] In some cases where the legislature did not have a reason, the Court went so far as to fabricate one.[41]

In 1972, the analysis of Supreme Court decisions softened somewhat with what is described as the "new equal protection" position. Presented by Professor Gunther in "The Supreme Court -- 1971 Term,"[42] and recognized by at least two Circuit Courts,[43] the theory holds that while the strict scrutiny doctrine remains, the Court is now willing to examine more carefully the means by which the legislature chooses to reach its legitimate ends. According to Gunther, the relationship between means and ends must now be substantial. While the viability of the "new equal protection" remains in doubt,[44] it is still necessary to examine the OE guidelines to find whether a rational basis exists.

Close examination of the OE guidelines reveals that not only does a rational basis exist, but it is substantial and most likely can withstand even the "new equal protection." The issue here is whether the OE guidelines are rationally related to the accomplishment of legitimate legislative ends and are free of invidious discrimination.[45] Reed also provides the language for the "new equal protection." The Court states that the statute,

> must be reasonable not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation...[46]

The legislative aims of the allocations for financial aid are stated in various places in Title 20 of the United States Code. The intent of the legislature is given for the National Defense Loans as the provision of programs to,

> increase our efforts to identify and educate more of the talent of our Nation. This requires programs that will give assurance that no student of ability will be denied opportunity because of financial need; will correct as rapidly as possible the existing imbalances in our educational programs.[47]

Educational Opportunity Grants were enacted,

> to provide through institutions of higher education, educational opportunity grants to assist in making available the benefits of higher education to qualified high school graduates of exceptional financial need, who for lack of financial means of their own or of their families would be unable to obtain such benefits without such aid.[48]

We can identify four basic purposes from these excerpts. They are:

1. To increase the effort to identify talent;
2. To provide programs to insure that students of ability are not denied opportunity because of financial need;
3. To correct imbalances in educational programs;
4. To insure that a family's lack of financial means does not deny benefits of higher education to qualified high school graduates.

The independent student conditions are not preceded by a preamble with legislative intent. We may assume, however, that Congress wished to make a special exception to the fourth purpose in the case where family income is irrelevant. Rather than ascertain the criteria itself, Congress

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delegated to the Commissioner of the Office of Education the responsibility for defining the independent student.[49] It is that definition which we are now measuring against the legislative intent.

At the outset, it is necessary to discuss whether Congress can require a parental contribution at all. Arguing against the parental contribution is the notion that one adult shall not be held responsible for the financial obligations of another against his will. Except in special circumstances such as support of a minor child or spouse, the law should not require a "brother's keeper." Provision of a college education surely does not compare to the provision of food, shelter, and clothing to those who rely on him for support.[50] To require such a contribution for a good of lesser import is to impose a duty which is both arbitrary and capricious.

Arguing for the parental contribution is the necessity, perceived by Congress, to limit the demands for public funds by encouraging private contributions by parents.[51] Statutes which deal with social welfare and economic issues are almost invariably upheld by the Court on the basis that Congress can allocate its resources "if any state of facts reasonably may be conceived to justify it."[52]

Justifications which may be put forward are many. Congress could feel that preparation for the future has traditionally been a family responsibility regardless of dependency status.[53] Another rationale might be that in order to better provide for the needs of the poor, Congress is requiring that parents who can afford to contribute be required to do so. This is basically a progressive income tax rationale. Perhaps Congress has

characterized higher education as an investment by the parent in his own future well-being. If the child is educated, there is less likelihood he will be a drain on the parent's resources in the future, or that the parent will be required to live in poverty since the child would ostensibly support him. Whatever justification is chosen, it is clear that a rational basis can be fashioned.

A "substantial rational basis" can also be supported on these same arguments. In Boraas,[54] the Court stated the "new equal protection" allows, "consideration ... of the nature of the unequal classification under attack, the rights adversely affected, and the governmental interests urged in support of it." These requirements are considerably more far reaching than a mere "rational basis." It is precisely these criteria which distinguish the OE rules from welfare legislation, however. The "new equal protection" seems to highlight the "rationality" of OE criteria rather than threaten them.

Congress has not gone so far as the above proposition suggests. Implied in that argument is the assumption that Congress may require reasonable contributions regardless of the relationship between parent and child. Congress has said only that it will not step in to provide support for a student whose parent is able to pay all or part of the cost of his education unless the child has severed his financial dependence relationship with the parent.

The question we must confront now is whether the criteria established to measure that severance are a rational means for identifying the self-supporting student. The first criterion, income tax dependency, is the

most easily defended. As mentioned above it is certain and enforceable. In addition, it presents a relevant measure of dependency. In U.S.D.A. v. Murry,[55] where tax dependency status was used as a measure of need, the Court did not question whether provision of half the child's support by the parent was a rational measure of dependency.

The second of the Office of Education criteria is less easily supported. The question we must ask is whether the receipt of $600 in cash or in kind by a student from the parent is a rational measure of dependency. The limit, unquestionably has serious drawbacks. For a student wishing to go to an expensive school where cost of education and maintenance can exceed $5,000 per year, the $600 limit is only 12 percent of the student's needs.

A more exaggerated case of inequality is demonstrated where the parent is paying the premiums on the student's life insurance. If those premiums amount to $600 in one year the student is denied self-support. This is true even though the parent is the beneficiary and the student's interest is limited to the paltry cash value plus an insignificant power to change the beneficiary. The power is useless because if the parent does not approve of the new beneficiary he can cease payments and the student does not have sufficient resources to continue them. In both cases, the $600 limit imposes a severe burden on the student.

One can conjure up example upon example of similar instances where the student appears to be unjustly deprived of financial aid. For the Equal Protection analysis, however, these arguments are howls in the wind. As the Court stated in Dandrige v. Williams,

> In the area of economics and social welfare, a state does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis', it does not offend the Constitution simply because the classification is not made with mathematical nicety or because in practice it results in some inequality.[56]

In setting limits on the amount of money the student may receive from his parent, Congress is merely drawing a line which it feels describes the student who has severed ties with his parents.

Congress has decided $600 is a goodly sum of money for most people, and any student who receives more is not sufficiently self-reliant to require federal assistance to go to college.

The third criterion, which limits stay at home visits to two consecutive weeks, is the most vulnerable to the equal protection attack. A student living and paying rent to his parents is denied self-support status under the OE rules. For this group the statute, is arbitrary and unjust in its application.

The criterion is also unnecessary. If the student is living rent-free at home, the financial aids office can attribute "in-kind" contributions for the rent. Allowing only $50 per month for rent. The student has used up the entire $600 allowed him in the second criterion.

As shown before, however, more than incidental arbitrariness is necessary to disturb a statute for lack of "rationality." The extent to which the Court has gone to illustrate its determination to uphold statutes is demonstrated in Williamson v. Lee Optical Co.,

> But the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.[57,58]

In conclusion, and Equal Protection attack on the OE proposed rules would most likely prove fruitless. The presumption in favor of statutes which pass the "strict scrutiny" criteria is extremely strong. Even regulations as poorly drawn as those discussed above are most likely constitutional.

In recent months, however, another line of cases has raised the possibility of attacking the Office of Education rules from another approach. Part B examines the manner in which the means seek the legislative ends and their constitutional ramifications.

Due Process

The most difficult of the constitutional hurdles the OE proposed rules must surmount is Procedural Due Process found in the Fifth and Fourteenth Amendments.[59] In Vlandis v. Kline,[60] the U.S. Supreme Court applied Procedural Due Process and struck down a Connecticut residency requirement that presumed a student is permanently a non-resident

for tuition purposes if he was a non-resident at the time of his application to a state university. Students were denied the opportunity to show that their status had changed, and that they had established such ties with the state as paying taxes, or taking a Connecticut driver's license which should entitle them to be bona fide residents. The Court held that this statute was an irrebuttable presumption often contrary to fact and, hence, violative of Due Process.[61] This case is particularly important for the present discussion because the OE framework may be an irrebuttable presumption contrary to fact and "lack critical ingredients of due process found wanting in Vlandis v. Kline."[62]

Vlandis is also important for other reasons. The Supreme Court has quite recently been chastized severely for its "overly warm" attitudes towards the middle class.[63] If this is the case, then Vlandis may bode ill for the Office of Education guidelines. Vlandis is plainly pro-middle-class student and threatens state laws which limit the access to state dollars by the middle-class. In addition, Vlandis deals with colleges. To the extent that case represents the court's attitude toward rules governing college students it may suggest the Supreme Court will take a critical view of the Office of Education rules.

If any portion of the OE rules are struck down, the weapon will most likely be Procedural Due Process. As the rules have been promulgated, a student who has been claimed as a tax dependent, or has received $600, or has lived at home more than 14 consecutive days is irrebuttably "not self-supporting." Such a statutue may be vulnerable to a Vlandis attack.

Before assuming that Vlandis tolls the death knell for the Office of

Education guidelines, we should examine it carefully. Only three of the Justices accepted the Vlandis approach wholeheartedly.[64] Two Justices concurred feeling the statute constituted an intrusion on the fundament right to travel.[65] One Justice felt the classifications were invidious and, therefore, unconstitutional.[66] And, three dissented.[67] In addition, the liberal cornerstone of the Court, Douglas, Brennan, Marshall and Stewart, were split. It is conceivable that this group would close ranks and vote against an attack on a statute whose effect is to provide more funds for the poor.

Along with this view is the troublesome question of Starns v. Malkerson which was summarily affirmed in the U.S. Supreme Court and cited with approval in Vlandis.[68] In Starns, the Supreme Court upheld a Minnesota regulation providing that no student could qualify as a resident for tuition purposes unless he had been a bona fide domiciliary of the state for at least one year prior to becoming a student. The crucial difference was that the Minnesota presumption was irrebuttable for only one year rather than permanent as was the case in Vlandis.[69] This suggests that even where an irrebuttable presumption is present, if it is reasonable, it will be upheld.

The Office of Education rules only operate on a year to year basis. Every year the student files for financial aid, he must complete a new form. This form contains any new information the student feels will change his status and make him eligible for greater aid. It is highly likely that based on Malkerson the Court will distinguish Vlandis and uphold the OE rules.

The stiffest test, however, is raised by the OE requirement that each of the criteria apply to the prior year as well as the year in which aid is received. In U.S.D.A. v. Murry,[70] the Supreme Court struck down a Food Stamp Act provision which used language almost identical to that found in

the first of the OE criterion. In Murry a household was denied eligibility in the Food Stamp Program if it included anyone over 18 years old who was claimed as a dependent for Federal income tax purposes by a taxpayer who was not also a member of an eligible household. The court held that the statute created an irrebuttable presumption that the household was not needy. The record showed this was often contrary to fact.

The tax dependency presumption in Murry was attacked on three grounds. First, because the presumption was conclusive, hearings were denied in the administration of the Act. Implicitly, the Court is recognizing that this is the type of situation that requires a hearing. Second, the Court had difficulty concluding "that it is rational to assume that a child is not indigent this year because the parent declared the child as a dependent in his tax return for the prior year."[71] Finally, the Act imposes a penalty upon an entire household because one member is presumed to be capable of supporting himself.

Underlying these grounds is the phenomenon of the irrebuttable presumption. While some may conclude that every statute which contains an irrebuttable presumption is now doomed to failure, this probably is not the case. Every statute is in some sense an irrebuttable presumption. If the law requires that drivers be licensed, a hearing is not required on a driver's competency if he is arrested for driving without a license. The law justifiably presumes the driver may not operate a motor vehicle. Unless such situations are within the scope of Murry, limits on the irrebuttable presumption must be found. The question is whether the OE rules are outside those limits.

Mr. Justice Marshall's concurrence in Murry sheds some light on what those parameters might be. He states,

> ...I believe that we must assess the public and private interests affected by a statutory classification and then decide in each instance whether individualized determination is required or categorical treatment is permitted by the constitution.[72]

It appears that this evaluation is the only way to explain how the Court may apply the analysis selectively. A recent court decision analyzed changes in the procedural requirements in this way:

> (T)he Supreme Court seems to have re-embraced, I think fortunately, the view that each particular institutional and factual context must be considered in determining whether any specific procedural protection... is constitutionally required...[73]

One can argue that "the institutional and factual context" of the OE guidelines is so different than that found in Murry that the irrebuttable presumption analysis is inappropriate. One can assert strongly, that the OE rules do not pose "a sufficiently direct threat of personal detriment" to require Procedural Due Process.[74]

The contrast is most telling when one compares food stamps to the college grant. The Supreme Court recognized this distinction in Memorial Hospital v. Maricopa Co.,[75] where it cited Malkerson with approval,

> While we fully recognize the value of higher education, we cannot equate its attainment with food, clothing, and shelter..."[76]

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Depriving a household of its subsistence has consequences far more severe than withholding scholarship funds. Because this is true the procedural requirements to protect a household's ability to eat must be far more stringent than an individual's ability to go to college.

This distinction is even clearer when one examines the alternatives available to the Murry plaintiffs and potential challengers of the OE rules. Murry plaintiffs must go without food, perhaps sell household belongings, or seek other forms of welfare. Individuals denied OE funds need only forego a college education for one year while living and working on their own. This is not an unconscionable requirement for an individual who is asserting his emancipation from his parents.

If we assume that the Court will balance the competing interests and require a less stringent standard for the OE rules than was required in Murry, it can be argued that the Office of Education rules adequately provide all the Due Process that is necessary. The Wisconsin "Self-Support Statement" asks specifically whether there are "circumstances...which help establish your claim of self-support."[77] If substantial circumstances exist and the other criteria are not met, special funds have been made available to meet the need to the extent possible. Although the applicant would be better off if he were "self-supporting," under this plan he is not totally deprived of funds.

Another important basis for distinction is the locus of impact of the two statutes. The Food Stamp Act deprived an entire household "even though they are one, or 10, or 20 in number."[78] The OE rules bear only on the student felt to be receiving parental support. No others suffer or are deprived of funds. It is conceivable that this fact alone would compel application of separate standards.

There are others, however. In Murry it was held the prior year was irrelevant in determining need today. This is not necessarily the case for college grants. Since the student has the reasonable alternatives of working for a year or getting parental support, the dependency status of the prior year serves to verify that the student has not established a pattern such that parental support is not likely to be forthcoming. Since self-support is a social as well as economic status such verification is reasonable.

Congress may assert that self-support is in some measure a function of the amount of time the student has been on his own. Congress may assume that if a student is independent for one year there will be little likelihood that he will fall back on his parent's resources while at college. Although one year is an arbitrary limit, Congress has drawn lines throughout its history and will continue to do so as long as those lines are reasonable.[79]

Requiring that a self-supporting student not have been claimed as a tax exemption also serves to prevent fraud on the government. This insures that the student is not getting both financial aid and parental aid. Admittedly it is not an ironclad system, but to be rational it does not have to be. Mr. Justice Douglas pointed out in U.S.D.A. v. Moreno[80] that fraud is a legitimate concern of Congress.

Although the OE criteria are strict and at times unjust, they are justifiable. Perhaps the greatest effect a court suit might have would be to strike down the habitation clause. It would appear, though, that the battle would not be worth the prize. The number of totally self-supporting students living at home is probably small. And, with enforcement of the clause next to impossible, one can guess, it is largely ignored.

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CONCLUSION AND RECOMMENDATION

Legal analysis tends to support the constitutionality of the Office of Education guidelines for independent student status. Neither Equal Protection nor Due Process pose an imminent threat. The qualitative difference between a college education and social welfare, the right to vote, or other "necessary" components of a democratic society suggests a court challenge of the Office of Education guidelines would not be sustained. A court suit would be fought in the interests of middle class students to the detriment of the poor. It is unlikely a court would favor such a course.

Focusing too sharply on the legality of the Office of Education criteria may convince one that the criteria ought not be tampered with. The strictness in the operation of the statute tends to impose arbitrary and often burdensome results on needy students. One way of ameliorating this impact is to provide for an appeals board at each institution for those who fall outside the criteria for self-support. Students who did not meet the self-support criteria but felt unjustly deprived of needed funds could ask for a review of their applications. The board would rank the appellants based on their need and their closeness to the Office of Education guidelines. Funds could then be distributed according to the review board's rankings.

Funds for the new third category would be allocated by the state or federal governments to the particular motitution on the basis of the number of students who achieved self-support status. For example, the Office of Education could determine that an amount equal to ten percent of all the funds allocated to self-supporting students at each institution be set

aside for the students in the new category at that institution. This means that a university which granted $100,000 to self-supporting students would receive an additional $10,000 for those students in the new category.

The funds allocated to the new category would be keyed to the funds allocated to the self-supporting students for two reasons. First, the criteria impose absolute requirements on who may qualify as self-supporting. Students either meet or do not meet the test. Consequently, if it is assumed financial aid officers adhere to the legal definition, the amount of funds in the new category will be limited to a definite figure not subject to administrative manipulation. Second, it is assumed that the number of persons who fail to meet the self-support definition is directly related to the number who do meet the requirements. Hence, the larger the number of self-supporting students, the more funds which are allocated to those in the "just miss" category.

The appeals board mechanism is advantageous for a number of reasons. First, it fits easily and simply into the present financial aid system. Drastic overhaul is unnecessary. Financial aid administrators are well practiced at sorting and ranking applications. In addition, the present criteria could be used as a bottleneck to prevent a flood of appeals. Fulfillment of one or two of the guidelines could be made a condition for appeal. This is, of course, arbitrary. But the practical advantages of using the present criteria, limiting the number of appeals, and still providing greater flexibility can outweigh the disadvantages. Secondly, the proposal need not cost any more than the present program. If new funds are unavailable, a percentage of the present funds could be reallocated to the new category. Finally, the plan offers greater flexibility and responsiveness. Students who are needy and, "for all intents and purposes"

independent, would receive aid even though outside the rigid walls of the definition.

The suggestion presented here responds to many of the arguments made against the Office of Education criteria. Adding additional flexibility to the already existing system would be a step forward in the attempt to make financial aid for higher education more accessible to those who are in need. Furthermore, it is a step which can be taken without excessive financial or institutional strain on the present system.

FOOTNOTES

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[1]New York Times, Monday, April 8, 1974.

[2]20 U.S.C. Section 1070a(2)(B)(iii), 1973.

[3]U.S. Constitution, Amendment XXVI. "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States, or by any State on account of age."

[4]Dresch, Stephen P., "Legal Rights and the Rites of Passage: Experience, Education, and the Obsolescence of Adolescence," Working paper, Yale University, Institution for Social and Policy Studies.

[5]California State Scholarship and Loan Commission, Rpt. no. 1, Student Financial Aid Research Series, 1973.

[6]Arthur Stickgold. Remarks presented to College Scholarship Service annual meeting in Dallas, Texas, April 1, 1974.

[7]Douma, Wallace. Interdepartmental Memo on the Wisconsin experience, April 12, 1974. The memo showed, between the 1972-73 and 1973-74 school year the number of self-supporting students increased from 22.1 percent to 26.6 percent for undergraduates and from 34.0 percent to 38.1 percent for all students. The percent of all aid given to self-supporting students increased from 25.5 percent to 33.0 percent for undergraduate and from 40.5 percent to 47.7 percent for all students.

[8]Parents may well be discovering that they will be better off stopping contributions to their children and encouraging self-support. The tax deduction is only $750 while the average expenditure for one year of college at the University of Wisconsin-Madison is about $1400. Presently, the financial aid office at Madison is filling all unmet needs. Parents, therefore can save approximately $650 by not taking the deduction.

[9]Where a student goes into the family business after college there are benefits such as low risk, immediate employment, and high starting salary which may accrue to him in addition to those listed.

[10]W. Lee Hansen and Burton H. Weisbrod, "The Distribution of Costs on Direct Benefits of Public Higher Education: The Case of California," Journal of Human Resources, Vol. 4, No. 2, Spring 1969, p. 176-191.

[11]"Basic Educational Opportunities Grant," 45 CFR 190.42(a) (1973). The regulatory scheme set out in the Code of Federal Regulations is unclear as to which programs these criteria apply to. Only Basic Educational Opportunities Grants are specifically under this definition. Loan programs for students in vocational and higher learning institutions are subject to a definition which differs only in the length of time a student may live at home. 45 CFR 177.3(c), 178.3(3) (1973). "College Work-Study Programs," 45 CFR 175.5(c) (1973), and "National Defense Student Loans," 45 CFR 144.7(b) (1973), are subject to general exceptions to the basic need equation. Financial aid administrators expressed in conversation, however, that as a practical matter the BEOG criteria are used for all of the programs.

[12]Where a parent fails to send in his return, the school has alternatives available. It may require an affidavit from the student and mail the name of the student and parent to the Internal Revenue Service. If the parent has claimed the exemption and is not supporting the student, the parent's return is fraudulent. The institution can then be appraised of IRS action. See U.S.D.A. v. Murry, 413, U.S. 508, 521 (1973), (Blackmun, J. dissenting).

[13]Internal Revenue Code, 26 U.S.C. (Supp. I) Section 151(e), as amended.

[14]272 N.E. 2d 567 (1971).

[15]ante, at 570

[16]U.S. Constitution, Amendment XIV. "No state shall make or enforce any law which shall...deny to any person within its jurisdiction the equal protection of the laws."

[17]See generally, Note, "Developments in the Law: Equal Protection," 82 Harv. L. Rev. 1065 (1969).

[18]In Re Griffiths, 413 U.S. 717; (1973), Graham v. Richardson, 403 U.S. 365 (1971).

[19]82 Harvard Law Review 1065.

[20]411 U.S.1 (1973).

[21]ante, at 32.

[22]ante, at 35.

[23]ante, at 36.

[24]262 U.S. 390 (1923).

[25]268 U.S. 510 (1925).

[26]406 U.S. 205 (1972).

[27]Kurland, P., "The Supreme Court, Compulsory Education, and the First Amendment's Religion Clauses," 75 W.Va.L.Rev. 213 (1973).

[28]383 U.S. 663 (1966).

[29]supra, 406 U.S., at 235.

[30]This raises the construction question, whether a visit by a student to his parent's home while he maintains a separate living elsewhere is "living" at the parent's home. Questions of residence and domicile would be involved.

[31]394 U.S. 618 (1968).

[32]____U.S. ____ (1974), 94 S. Ct. 1076, 1081 (1974)

[33]405 U.S. 330 (1972).

[34]326 F. Supp. 234, 238 (Minn. 1970), aff'd. 401 U.S. 985, and cited with approval in Memorial Hospital v. Maricopa Co., supra, 94 S. Ct., at 1083 n 15.

[35]supra, 394 U.S., at 629

[36]413 U.S. 528, 538 (1973) (Douglas, J. concurring).

[37]No. 73-191, 42 L.W. 4475 (1974).

[38]ante, at 4480 (Marshall, J. dissenting)

[39]supra, 411 U.S., at 20.

[40]Mr. Justice Marshall, joined by Mr. Justice Brennan, dissenting in Dandridge v. Williams, 397 U.S. 471, (1970), analyzed the rational basis doctrine this way, at 508:

> ...regardless of the arbitrariness of the classification it must be sustained if any state goal can be imagined that is arguably furthered by its effects. This is so even though the classification's under-inclusiveness or over-inclusiveness clearly demonstrates that its actual basis is something other than that asserted by the State, and even though the relationship between the classification and the state's interests which it purports to serve is so tenuous that it could not seriously be maintained that the classification tends to accomplish the asserted goal.

[41]Railway Express Agency v. New York, 336 U.S. 106 (1949).

[42]86 Harvard Law Review 1 (1972).

[43]Eslinger v. Thomas, 476 F. 2d 225 (4th Cir. 1973), Borass v. Belle Terre 476 F. 2d 806, 814 (2d Cir. 1973). See also, Weber v. Aetna Casulty Co., 406 U.S. 164 (1971), (Rehnquist, J. dissenting).

[44]Mark A. Tushnet, "'...And Only Wealth Will Buy You Justice' -- Some Notes on the Supreme Court, 1972 Term," 1974 Wis. L. Rev. 176. supra, 476 F. 2d, at 826 (Timbers, J. dissenting).

[45]Reed v. Reed, 404 U.S. 71 (1971).

[46]ante, at 76. Citing Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

[47]20 U.S.C. Section 401.

[48]20 U.S.C. Section 1061.

[49]20 U.S.C. Section 1070a(3)(c).

[50]supra, 94 S. Ct., at 1083 n. 15.

[51]Richardson v. Belcher, 404 U.S. 78 (1971).

[52]McGowen v. Maryland, 366 U.S. 420, 426 (1960), Jefferson v. Hackney 406 U.S. 535 (1972).

[53]U.S.D.A. v. Moreno, 413 U.S. 528, 93 S. Ct. 2821, 2829 (Douglas, J. concurring) stated, "Congress might choose to deal only with members of a family of only two, or three generations, treating it all as a unit."

[54]supra, 476 F. 2d, at 814.

[55]413 U.S. 508, 93 S. Ct. 2832 (1973).

[56]supra, 397 U.S., at 484-5.

[57]348 U.S. 483, 487-488 (1955).

[58]Two weeks is the approximate length of the longest mid-year school vacation. A student staying at home longer than that is probably 1) going to school with extended mid-year vacations, 2) living at home year around, or 3) staying home summers. Congress can reasonably assume that any student filling one of these categories is receiving aid from his parents.

[59]This issue was raised in W. Lee Hansen and Robert J. Lampman, "Basic Opportunity Grants for Higher Education: Will the Outcome Differ from the Intent?" Institute for Research on Poverty Discussion Paper Number 194-74, pg. 11.

[60]412 U.S. 441 (1973).

[61]ante, at 453.

[62]U.S.D.A. v. Murry, 413 U.S. 508, 514 (1973).

[63]Tushnet, supra.

[64]Messr. Justices Stewart, Blackmun, and Powell.

[65]Messr. Justices Marshall and Brennan.

[66]Mr. Justice White.

[67]Messr. Justice Douglas and Rehnquist and Mr. Chief Justice Burger.

[68]supra.

[69]412 U.S., at 452 n. 9.

[70]supra.

[71]supra, 413 U.S., at 514.

[72]ante, at 519.

[73]Suckle v. Madison General Hospital, 362, F. Supp. 1196, 1211 (W.D. Wis. 1973). Citing Morrissey v. Brewer, 408 U.S. 471, 481 (1972), and Gagnon v. Scarpelli, 411 U.S. 778 (1973).

[74]Doe v. Bolton, 410 U.S. 179, 188 (1973).

[75]supra, 94 S. Ct. at 1083 n. 15.

[76]supra, 326 F. Supp., at 238. Also quoted in Kirk v. Board of Regents, 273 Cal. App. 2nd. 430, 437, 78 Cal. Rptr. 260, 266 (1969), appeal dismissed, 396 U.S. 554 (1970).

[77]"Parent Verification/Self-Support Statement," Form, University of Wisconsin-Madison, Office of Student Financial Aids.

[78] supra, 413 U.S., at 514.

[79] Louisville Gas Co. v. Coleman, 277 U.S. 32, 41 (1927) (Holmes J. dissenting).

[80] supra, 413 U.S., at 542-543.